

**STRATEGY  
RESEARCH  
PROJECT**

The views expressed in this paper are those of the author and do not necessarily reflect the views of the Department of Defense or any of its agencies. This document may not be released for open publication until it has been cleared by the appropriate military service or government agency.

**CONSTITUTIONAL RIGHTS OF GOVERNMENT EMPLOYEES**

**BY**

**COLONEL LARRY L. THOMAS  
United States Army**

**DISTRIBUTION STATEMENT A:  
Approved for Public Release.  
Distribution is Unlimited.**

**USAWC CLASS OF 2001**



**U.S. ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013-5050**

**20010621 122**

USAWC STRATEGY RESEARCH PROJECT

**Constitutional Rights Of Government Employees**

by

Colonel Larry L. Thomas  
U.S. Army

Colonel Cortez K. Dial  
Project Advisor

The views expressed in this academic research paper are those of the author and do not necessarily reflect the official policy or position of the U.S. Government, the Department of Defense, or any of its agencies.

U.S. Army War College  
CARLISLE BARRACKS, PENNSYLVANIA 17013

DISTRIBUTION STATEMENT A:

Approved for public release.  
Distribution is unlimited.



## **ABSTRACT**

AUTHOR: Colonel Larry L. Thomas

TITLE: Constitutional Rights Of Government Employees

FORMAT: Strategy Research Project

DATE: 9 April 2001 PAGES: 31 CLASSIFICATION: Unclassified

The intent of this research paper is to study the evolution of the constitutional rights of government employees. There is a perception by many young and old citizens that one must give up some constitutional rights to work for the federal government. Is this perception a reality? If so, what rights must surrendered in order to accept employment with the federal government? I will review the evolution of federal employee rights from the days of Spoils Patronage to the present. My goal is to examine the congressional legislation that protects the rights of federal employees. Is it time to delete or amend the legislative acts that have become the baseline for protecting employer and employee practices?



## TABLE OF CONTENTS

<b>ABSTRACT .....</b>	<b>iii</b>
<b>LIST OF ILLUSTRATIONS.....</b>	<b>vii</b>
<b>LIST OF TABLES .....</b>	<b>ix</b>
<b>CONSTITUTIONAL RIGHTS OF GOVERNMENT EMPLOYEES .....</b>	<b>1</b>
<b>INTRODUCTION .....</b>	<b>1</b>
<b>BASIS OF EMPLOYEE RIGHTS.....</b>	<b>2</b>
<b>POLITICS -- IMPACT ON EMPLOYEE RIGHTS.....</b>	<b>3</b>
THE TENURE OF OFFICE ACT OF 1867. ....	4
CIVIL SERVICE COMMISSION. ....	5
THE CIVIL SERVICE ACT OF 1883. ....	5
REFORMS CONTINUED AFTER THE PENDLETON ACT. TO NAME A FEW: .....	6
POLITICAL ACTIVITIES ACT OF 1940. ....	6
<b>HUMAN RIGHTS -- IMPACT ON EMPLOYEE RIGHTS.....</b>	<b>7</b>
THE CIVIL RIGHTS ACT OF 1964. ....	8
THE EQUAL PAY ACT OF 1963.....	9
REDRESS OF GRIEVANCES. ....	9
<b>Section 1983 and 1981.....</b>	<b>9</b>
<b>Title VII.....</b>	<b>9</b>
<b>Section 1983 and 1981.....</b>	<b>10</b>
<b>Title VII.....</b>	<b>10</b>

THE FAIR LABOR ACT OF 1938.....	10
EMPLOYEE RIGHTS AND THE EXECUTIVE AND LEGISLATIVE BRANCHES.....	10
STATE AND LOCAL GOVERNMENT REFORMS.....	13
WHAT'S NEXT? IMPLICATIONS FOR FUTURE GOVERNMENT EMPLOYMENT.....	15
RECOMMENDATIONS.....	16
CONCLUSION.....	17
ENDNOTES.....	19
BIBLIOGRAPHY.....	21

## **LIST OF ILLUSTRATIONS**

FIGURE 1 PROHIBITIVE PRACTICES .....	1
FIGURE 2 HATCH ACT .....	6
FIGURE 3 CIVIL RIGHTS ACT .....	8
FIGURE 4 JOB DISCRIMINATION .....	8



## **LIST OF TABLES**

TABLE 1 GRIEVANCE PROCESS .....	10
---------------------------------	----



## CONSTITUTIONAL RIGHTS OF GOVERNMENT EMPLOYEES

### INTRODUCTION

a. Constitutional Rights of government employee is a combination of basically good human resources management practices (e.g. Consideration of Others) and a well thought out approach to reducing partisan politics practices. The effort to correct unfair hiring and firing practices in the workplace extends back to the early 19<sup>th</sup> century. In the 19<sup>th</sup> Century it was commonplace for newly elected officials to start their term of office by replacing employees of

"As we found in earlier surveys, a significant portion of the Federal workforce remains concerned about the incidence of prohibited personnel practices. Although 60 percent of the workforce said their right to work in an environment that is free from prohibited personnel was adequately protected, 27 percent thought they had only minimal protection and another 14 percent believed they had no protection from these types of abuses."

the opposite party. Even replacing those of the same party affiliation, if they were of the opposite wing of the party. This is commonly referred to as "Rotation of Office." By today's standards this approach is a clearly unacceptable way of doing business. Given the massive amount of policy transactions that happen daily, plus the

### FIGURE 1 PROHIBITIVE PRACTICES

countless responsibilities to administer national and domestic programs; having a professionally trained civil service workforce is absolutely necessary. In the mid-19<sup>th</sup> century it was believed that anyone with good common sense could perform these duties. Every President, Senator, Representative and political official at federal, state and local levels exercised the practice of rewarding political backers with civil service positions. One of the most skillful users of partisan politics was President Abraham Lincoln. So while reducing incidents of partisan politics, the practice was still used. Even today the statutes and laws governing fair and ethical treatment of public and private citizens do not apply to the Executive and Legislative branches of government.

b. Over the course of this paper I will examine the roots of employee rights and it's current status as it applies to government employees. The journey to fair labor practices has many arteries. Some of the reforms are based on political moves to stabilize the work force, while others are based on human rights issues. I will start with the basic constitutional roots of employee rights, then trace its movement to the work place and the practices we live by today. In the end, I will offer recommendations on whether these laws should be relaxed, sustained, or toughen.

c. In 1996 the Merit System Protection Board conducted a survey of government employee. The feedback of the respondents (9,710) are strategically placed throughout this

document to give you a flavor of what employees are thinking of today on that particular topic. Throughout this document I will use the terms public employee, federal employee, and government employee interchangeability. All three terms refer to the same group of people – those that work for the government.

### **BASIS OF EMPLOYEE RIGHTS.**

a. The Constitution is one of the most important documents governing the rights of United States citizens. As such, it should not come as any surprise that the basis for employee rights are linked directly to the Constitution. If employee rights were not rooted in such a powerful document it would not have been able to stand up to the challenges of numerous court battles, political gamesmanship, back channel moves by private citizens, industry and government officials.

b. Employee rights are based on three amendments to the Constitution of the United States. The 5<sup>th</sup>, 13<sup>th</sup>, and 14<sup>th</sup> Amendments lay the groundwork for all work place rights. From these amendments stem laws that govern how employees should be treated.

(1) 5th Amendment – “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” *This amendment set forth eight guidelines/right of the employee*

- (1) The right to know the reason for any discipline.
- (2) Opportunity to response.
- (3) Right to hearing by a neutral party.
- (4) Right to be represented by legal counsel.
- (5) Right to confront adverse witness (es)\_\_\_.
- (6) Right to mount a defense.
- (7) Requirement for legally credible evidence.
- (8) Right of appeal.

(2) 13th Amendment -- “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the

United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." *Thus setting forth the grounds against involuntary servitude throughout the country. A fair wage for a fair days work.*

(3) 14th Amendments – "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ... Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. *This amendment eliminated the concept that a member of a minority group was somehow to be counted as less than a whole man (i.e. the discrimination practice that stated a black man was 80% or 4/5<sup>th</sup> of a white man). Minority employees are afforded the same rights granted the majority.*

(4) These three amendments set the basic rules for the fair and equitable treatment of every employee in the workforce. From these amendments will come the legislative acts that will set the tone for fair employee treatment in the areas of hiring, wages, discipline, and work place behavior?

## **POLITICS -- IMPACT ON EMPLOYEE RIGHTS.**

### **a. Efforts to Reform the Civil Personnel Service System.**

(1) Many reform actions have been implemented to change Spoils Patronage practices to Merit Based personnel placement practices. The main theme of the reform movement was to establish two sets of government employee: The first group is those that set policy. These are our elected officials. They have the legal right to set policy for the United States. The second group is policy implementers -- sometimes referred to as beaucracy. This split grouping is sometime referred to as Politics/Administration Dichotomy.

(2) In general, leaders of the reform movement were those that had lose to the current administration and sought to destroy the political base of the current ruling party. Their motives were more political then righteous. But never the less their actions serviced to insulate the doers from politicians. Additionally, as the country's economical and social horizons expanded to overseas markets, it became important to have men of ability in the critical positions. This meant that professionals are required to administer to the day-to-day working of the government. Thus attacking the earlier belief that anyone with common sense could come in and immediately do a good job.

(3) President Thomas Jefferson refused to fire incumbent office holders for political reasons alone. In an attempt to reform the spoils patronage system, at the policy execution level of employment, Jefferson issued an executive order that accomplished three things: (1) allow removal of an office holder for misconduct only. (2) Forbid federal administrators from taking an active part in elections. (3) Seeking to make the federal service "politically representative" of the partisanship of the country by appointing members of both parties to federal positions. His aim was to establish "Political Neutrality" work force. The next three Presidents generally followed Jefferson's guidelines. However, when Andrew Jackson took office he returned to a policy of "Rotation of Office."

#### THE TENURE OF OFFICE ACT OF 1867.

The Tenure of Office Act, passed over the veto of President Andrew Johnson on March 2, 1867, provided that all federal officials whose appointment required Senate confirmation could not be removed without the consent of the Senate. When the Senate was not in session, the Act allowed the President to suspend an official, but if the Senate upon its reconvening refused to concur in the removal, the official must be reinstated in his position. It was not entirely clear whether the Act applied to cabinet officials appointed by a previous president, such as Secretary of War Edwin Stanton, a Lincoln appointee. In the summer of 1867, with Congress not in session, Andrew Jackson decided the time had finally come to replace Edwin Stanton with a new secretary of war. Stanton had become increasingly at odds with President Johnson and the rest of his cabinet, and had been conspiring with Radical Republicans in Congress to thwart Johnson's policies on Reconstruction, which were considered too soft by the Radicals. On August 5, 1867, Johnson sent Stanton the following message: "Public considerations of high character constrain me to say that your resignation as Secretary of War will be accepted." Stanton refused to resign, forcing Johnson to send Stanton a second letter suspending him from office, ordering that he cease all exercise of authority, and transferring power to a new secretary of war, Ulysses S. Grant. On January 3, 1868, the new Congress met and refused to concur in the removal of Stanton by a vote of 35 to 16. The President, however, refused to accept the Senate's decision, believing the Tenure of Office Act to be an unconstitutional infringement on the power of the executive. Hoping to obtain judicial review of the Act's constitutionality, Johnson on February 21, 1868 appointed General Lorenzo Thomas, Adjutant General of the Army, to the post of secretary of war. Stanton balked at leaving the office he had reoccupied since January. Charles Sumner, one of the Senate's leading Radical Republicans, sent Stanton

a one word telegram: "Stick." Impeachment proceedings began within days. Although both Presidents Ulysses Grant and James Garfield complained strenuously about the Tenure of Office Act, the Act was not repealed until 1887, at the urging of then President Grover Cleveland. In 1926, in the case of Myers vs. United States, the Supreme Court, in an opinion by Chief Justice Taft, held unconstitutional a law requiring the consent of the Senate for removal of certain non-Cabinet officials. There is no similar rule governing the release of employee in the private sector. Private companies can generally release/dismiss employees (white collar, blue collar, and labors) at any time without the approval any other board. This law is a substantial benefit to public sector employees. It provides a sense of guaranteed income, job assurance, and quality of life.

#### CIVIL SERVICE COMMISSION.

President Grant's Civil Service Commission, authorized by Senator Trumbull's "rider" on a bill, was established in 1871 with the sole goal of setting in place rules and regulations to be used to determine the fitness of a candidate for a government position. This may have been the first attempt to lay down some form of a "merit" like system. Congress failed to appropriate funds for the commission's work. Thus the commission terminated in 1875. However the commission did establish some guidelines that took root. The "*Rule of Three*" is one such guideline. The rule stated that after testing, scoring, and ranking the top three individuals had to be considered first for the position. Second, promotion within the service should be decided on by competitive examination limited to only those in the agency. Third, restricting lateral entry. Thus requiring new employees to come in at the entry level. This provides a fair selection process for candidates in the public sector. This rule is not mandatory in the private sector. Thus it is entirely possible for a private sector employer to select a less qualified applicant because of his/her political, family, social connections. Without this rule applicants are not ensured a fair selection process for job openings.

#### THE CIVIL SERVICE ACT OF 1883.

During the years leading up to the Civil Service Act of 1883<sup>1</sup>, many reform organizations cropped up. The New York Civil Service Reform Association of 1877 is the most noted. The Civil Service Reform League was the result of a merger of numerous reform associations. The league is known today as the National Civil Service League. President Hayes established a study group, lead by Dorman E. Eaton, to examine the British experience with civil service reform and report out. (Note: While the United States system of Spoils Patronage was modeled after the British, the U.S. kept spoils system much longer than the British.). Eaton's

commission reported out ("Eaton Report" in 1879. The report provided the framework for the Civil Service Act of 1883. The assassination of President James A. Garfield in 1881, by Charles Guiteau, a disgruntled office seeker, coupled with the Republican losses in the congressional elections in 1882 set the stage for reforms. The Civil Service Act of 1883, also known as the Pendleton Act, was established to control entry into office in the federal service. The work of the commission was mainly limited to lower grades. Not until the first 20 years to the 20th century did the merit system of recruitment expand to cover half the posts in the federal service. The commission's control gradually increased over lower, middle, and managerial offices in the federal service. After 1978 (The Civil Service Reform Act of 1978<sup>2</sup>, CSRA) the functions of the commission were divided between the Office of Personnel Management and the Merit Systems Protection Board (a three member bipartisan board that is appointed by the President and approved by the Senate). Policy making positions remained outside the jurisdiction of the commission, being filled instead by presidential appointment.

#### REFORMS CONTINUED AFTER THE PENDLETON ACT. TO NAME A FEW:

- Federal Labor Relations Authority (FLRA) is a three-member board appointed by the President with the advice and consent of congress. The authority adjudicates disputes arising under Statute.
- CRSA of 1978, Title IV, covered senior federal service positions GS-16, 17, 18 grades and level IV and V of the Senior Executive Service (SES) Pay Schedule.

#### POLITICAL ACTIVITIES ACT OF 1940.

(1) The Political Activities Act (Hatch Act) of 1940<sup>3</sup> – the act extended the reach enforcement to include all state and local government funded (in whole or part) by the federal government. The act restricted

- Holding a delegate or alternate position.
- Political campaign fund rising.
- Holding office in a political organization.
- Any electioneering activities.

Congressmen generally viewed the Hatch Act unconstitutional? In 1974 congress repealed the Act. Collective Bargaining serviced to destroy much of the

"Despite changes in the Hatch Act reducing limits on Federal employee participation in partisan political activities, employees seldom chose to exercise their right to be more active in partisan political activities. Employees also continued to believe they are adequately protected from coercion because of partisan politics"

FIGURE 2 HATCH ACT

state and local patronage systems. Court case after court case, the patronage system lost its hold on a spoils form of personnel placement. Legislative Acts like The Police and Firemen's Collective Bargaining Act of 1968 and The Public Employees Relations Act of 1970 are some to the cornerstone acts. The federal government continues to enact legislation to force states to comply with merit system initiatives.

(2) Many efforts have been taken in the political arena to make government sector employment more attractive to citizens. However, some would say that the practice of political partisanship is still alive and well today and I'm sure that most of us have experienced, at some point in our lives, situations that look a lot like Spoils Patronage. In the recent Presidential Campaign, Presidential Candidate Ralph Nader said of the campaign

"...was a system of spoils and patronage. For each of the two candidates, one the son of a former President, the other the son of a former Senator, the prospect of the presidency was mainly about power, power that could keep literally thousands, perhaps even millions of people, prosperous as appointees, employees, lobbyists, ... "<sup>4</sup>

**It is interesting to note that most of the legislation enacted by congress does not apply to them.** The congressional branch of government has excluded itself due to self-considerations.

(3) These efforts to separate the employee from improper management practices are a benefit to the public sector. The press the support (involuntarily) the campaign of a supervisor could be substantial if your job depended it. Employees in the private sector are not guaranteed this benefit. Therefore it is entirely possible for their supervisor to call on their support for personnel political gain.

#### **HUMAN RIGHTS -- IMPACT ON EMPLOYEE RIGHTS.**

The 1960s and 70s saw an increased interest in human rights. The United States was at war in Vietnam and at home. Anti-war demonstrators took to the streets of the country to protest our presence in Vietnam. While civil rights demonstrators protested the country's disregard for basic human rights for all citizens. During this same period the federal government started to focus on the decline of living conditions in metropolitan areas. As a result of all the unrest in society, federal lawmakers and policy makers started to enact many programs, policies, and laws to correct the injustice of the past. A by-product of this effort was the enactment of federal employee rights in the work place. These laws are the cornerstones of basic human rights for employees in all sectors of the work place.

## THE CIVIL RIGHTS ACT OF 1964<sup>5</sup>.

In the 1960s, Americans who knew only the potential of "equal protection of the laws" expected the president, the Congress, and the courts to fulfill the promise of the 14th Amendment. In response, all three branches of the federal government--as well as the public at large—debated a fundamental constitutional question: Does the Constitution's prohibition of denying equal protection always ban the use of racial, ethnic, or gender criteria (14<sup>th</sup> Amendment) in an attempt to bring social justice and social benefits? In 1964 Congress passed Public Law 82-352 (78 Stat. 241). The provisions of this civil rights act forbid discrimination on the basis of sex as well as race in hiring, promoting, and firing. The word "sex" was added at the last moment. According to the West Encyclopedia of American Law, Representative Howard W. Smith (D-VA) added the word. His critics argued that Smith, a conservative Southern opponent of federal civil rights, did so to kill the entire bill. Smith, however, argued that he had amended the bill in keeping with his support of Alice Paul and the National Women's Party with whom he had been working. Martha W. Griffiths (D-MI) led the effort to keep the word "sex" in the bill. In the final legislation, Section 703 (a) made it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex, or national origin." The final bill also allowed sex to be a consideration when sex is a bona fide occupational qualification for the job. Title VII of the act created the Equal Employment Opportunity Commission (EEOC) to implement the law. The Civil Rights Act of 1964 was amended in 1991 to include the Americans with Disabilities Act of 1990 laws. The amended law was titled The Civil Rights Act of 1991. Its

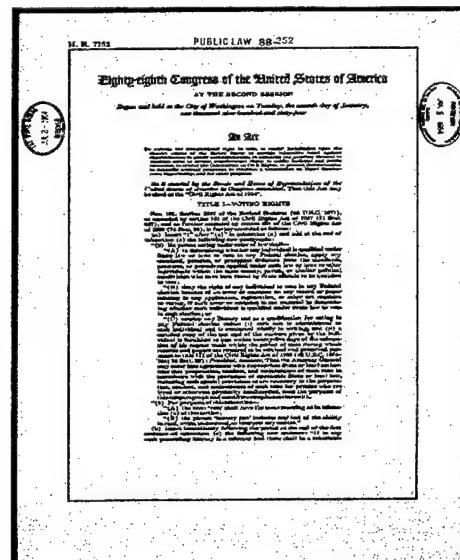


FIGURE 1 CIVIL RIGHTS ACT

however, argued that he had amended the bill in keeping with his support of Alice Paul and the National Women's Party with whom he had been working. Martha W. Griffiths (D-MI) led the effort to keep the word "sex" in the bill. In the final legislation, Section 703 (a) made it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex, or national origin." The final bill also allowed sex to be a consideration when sex is a bona fide occupational qualification for the job. Title VII of the act created the Equal Employment Opportunity Commission (EEOC) to implement the law. The Civil Rights Act of 1964 was amended in 1991 to include the Americans with Disabilities Act of 1990 laws. The amended law was titled The Civil Rights Act of 1991. Its

"Federal employees were also just as likely to think they were victims of discrimination because of their race as they were 4 years ago. Furthermore, in their response to the question of whether they had been treated fairly with regard to promotion, awards, training, performance appraisals, and discipline, we found evidence that the perceptual disparity between minorities and non-minorities has remained unchanged since 1992."

FIGURE 2 JOB DISCRIMINATION

mission of the EEOC is to investigate complaints of employment discrimination on the basis of age, disability, sex, race, religion, color, creed or national origin. They also handle equal pay cases. Has the authority to enforce the ADA - Americans with Disabilities Act of 1990. These laws apply to both public and private sectors.

#### THE EQUAL PAY ACT OF 1963.

The Equal Pay Act<sup>6</sup> was adopted after a 20-year effort. The Act amended the Fair Labor Standards Act of 1938 to provide equal pay for equal work for all employees. The act was aimed at correcting a problem with sex discrimination. Women in the early 20<sup>th</sup> century were seen as working to supplement the husband's income. The husband's salary was the main income; as such, men received better pay in their jobs. The statute mandates that men and women performing the same work must be paid the same, subject to limited exceptions related to seniority, productivity (i.e. a bona fide differential piece rate system or merit. However, the act doesn't address pay equity among positions in an organization. In many situations jobs that are traditionally filled by women received the lowest pay. Organizations are left to correcting the job equity problem on their own accord. This law applies to employees in the public and private sectors.

#### REDRESS OF GRIEVANCES.

The Civil Rights Act of 1866 (section 1981) and 1871 (section 1983)<sup>7</sup> were created to provide a means for enforcing the provisions of the 13th and 14th Amendments. Prior to EOA of 1972's extension of the Title VII state and local government were not covered. After EOA of 1972 state and local governments having 15 or more employees with twenty weeks of employment had to comply. Additionally, the extension covered educational institutions and not-for-profit organizations. The complaint can choose to take his/her complaint through the EEOC process or sections 1981/83 route. Some of the advantages and disadvantages to both methods are outlined in the table below.

	<b>Section 1983 and 1981</b>	<b>Title VII</b>
<b>Period to file legal suit</b>	Can file immediately	Must exhaust the administrative procedures and receive "Notice of Right to Sue" letter. The complaint has 90 days from the date of receipt to the letter to file suit.

	<b>Section 1983 and 1981</b>	<b>Title VII</b>
<b>Complaint filing</b>		Within 180 days to unlawful act or 300 days if proceed under Section 706 of Title VII.
<b>Good for Class Action Option</b>	Yes	No
<b>Remedies</b>	Compensatory and punitive damages, plus Equitable Relief with 2 yr limitation	Limited to Equitable Relief and back pay (normally no more than 2 yrs back pay).
<b>Cost of pursuing the case</b>	Out of pocket	EEOC

TABLE 1 GRIEVANCE PROCESS

If the complaint is seeking full powers of the law or to enter into a class action suit, it is better to take the section 1981/83 option because it keep a whole range of options available to the complaint and his/her lawyers. But the cost may be great in terms of out of pocket money. While eventually the complaint and lawyers are seeking to recoup the cost of litigation from the employer, all seed money for the suit must come from the complaint(s). If the complaint merely wants to get the employer to correct the policies, procedures, and practices that are discriminatory, then Title VII can accomplish the task. But one should understand that the first goal of the EEOC under Title VII is to make voluntary resolution of redress. As mentioned earlier, if satisfaction is not achieved the complaint can appeal to the EEOC Office of Review and Appeals. This process is available only to federal employees. There is no mandated grievance process in the private sector. Therefore private sector employees are not assured a fair hearing or appeal of judgments against their employer.

#### THE FAIR LABOR ACT OF 1938.<sup>8</sup>

Not all human rights laws were enacted in the 60's and 70s'. The Fair Labor Act was enacted in 1938. The Fair Labor Standards Act of 1938 is published in law in sections 201-219 of title 29, United States Code. The Act provides for minimum standards for both wages and overtime entitlement. Additionally, it spells out administrative procedures by which covered work time must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. This law impacts both the public and private sectors.

#### **EMPLOYEE RIGHTS AND THE EXECUTIVE AND LEGISLATIVE BRANCHES.**

(1) The Executive and Legislative branches of government are generally exempted from rules, laws, and statutes enacted to protect the rights of civil servants. These branches feel that the civil servant protection rights would handicap the efficient and effective execution of these branches of government. For example, the Political Activities Act or Hatch Act of 1940

restricted the political activities of civilian servants. Some of the restrictions that would directly impact Executive and Legislative branches ability to conduct business are:

- Soliciting or handling political campaign contributions.
- Being an officer or organizer of a political club.
- Leading or speaking to a partisan political meeting or rally.
- Engaging in "Electioneering" activities.

It is easy to see, just from the few rules listed above, that the restrictions would greatly minimize the ability of politicians to use their staff during the campaign. Instead of the Hatch Act, the executive and legislative branches have developed a set of ethics governing the behavior of members and employees.

The Senate has The Senate Ethics Manual<sup>9</sup> to set guidelines on employee behavior.

The manual applies to:

"current Members, officers, and employees of the Senate (1(a)(1) and (2)). Unlike the previous Rule 35, spouses and dependents are not separately subject to the gift limitations. Rather, under the current Rule, a gift to a family member (or any other individual) is considered a gift to the Member, officer, or employee only if it is given with the knowledge and acquiescence of the Member, officer, or employee and the Member, officer, or employee has reason to believe the gift was given because of the official position of the Member, officer, or employee. The Rule does not restrict anyone else, such as candidates, or future or former Members or employees. In addition, the Committee has determined that the Vice President, although a constitutional officer with the duty of presiding over the Senate, is not a Member, officer, or employee of the Senate as those terms are used in the Code of Official Conduct 42. However, any employee of the Vice President whose salary is disbursed by the Secretary of the Senate is fully subject to the Senate Code of Official Conduct."

The manual sets forth behavior guidelines in the following areas:

- Gifts
- Conflicts of interest and outside earned income
- Prohibition on unofficial office accounts
- Financial Disclosure
- Political Activity
- Use of the Frank, Stationery, and Senate Facilities
- Constituent Service
- Employee Practices

The sections on Political Activities and Employee Practices are of interest when looking at employee constitutional rights. The Senate places some restrictions on the activities of members, but not like those enacted by the Hatch Act. For instead, note the careful wording on allowable activities by Senator and Staff:

“...However, the Ethics Committee has previously ruled that it is not improper for a Senate employee to engage in campaign activity on his or her own time so long as such activity complies with Senate Rule 41.1 that prohibits fundraising by most Senate employees for federal campaigns... In addition to campaign work by staff, the topic of political activity also includes the uses of campaign funds, and restrictions applicable thereto, by Members of the Senate. Like all candidates for federal office, members are subject to regulations on campaign finance pursuant to the Federal Election Campaign Act of 1971, as amended...”<sup>10</sup>

“...Nonetheless, the “Hatch Act,” which until recently prohibited partisan political activity by federal civil service employees, *never applied to congressional staff*. As discussed more fully below, Senate Rule 41 prohibits Senate staff, with the exception of specified “political fund designees,” from handling federal campaign funds. Subject to that restriction, however, and as long as they do not neglect their official duties, Senate employees are free to engage in campaign activities on their own time, as volunteers or for pay, provided they do not do so in congressional offices or otherwise use official resources. An employee’s “own time” includes time beyond regular working hours, any accrued annual leave, or non-government hours of a part-time employee. *Staff may not be required to do political work as a condition of Senate employment*. Just as Senate employees are free to campaign for their employing Members on their own time, they may also use their free time or, with the permission of their employing Members, reduce their Senate hours, to campaign for presidential candidates, other federal candidates, or state or local aspirants.”<sup>11</sup>

(2) House of Representatives. The Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives addresses virtually the same ethical areas as the U.S. Senate. However, there is one exception.<sup>12</sup> The House of Representatives manual has one chapter (chapter 5) dedicated to staff rights and duties. This chapter describes the rules that guide behavior in hiring, salaries, campaign activities, and outside employment.

- Hiring – members are prohibited from discrimination in hiring. They are also prohibited from recommending hiring a relative. Members are prohibited from promising federal jobs in return for contributions and are prevented from issuing threats to block hiring for political reasons.
- Salaries – prohibits sharing of salaries, kickbacks, and spending money to benefit a member or member’s office.

- Campaign Activities – employees are *not covered by the "Hatch Act."* Employees are free to voluntarily engage in campaign activities. Employees are prohibited from making contribution to their Member of Congress. This helps to protect employee against office pressure to donate to members campaign.
- Outside Employment – employees may have and outside job as long as it doesn't adversely impact their performance at work. Conflicts of interest are prohibited.

Once again congress has been careful not to prohibit campaigning by employees. They clearly state that the provisions of the "Hatch Act" don't apply in the case of congress. Congress believes that if they *automatically* subject themselves to the restrictions of the "Hatch Act" (and many others employee rights legislation) it would unduly subject them to many law suites. Thus hampering their ability to perform the duties of a congressman.

(3) Executive Branch. The new administration is in the process of revising this document. Given the many incidents of the past administration, I am sure that there is a very structured and detailed document on ethics coming soon.

#### **STATE AND LOCAL GOVERNMENT REFORMS.**

a. The 10<sup>th</sup> Amendment of the Constitution limited the federal government ability to apply reforms to state and local government. *The 10<sup>th</sup> Amendment states:*

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

b. At the State and local levels reform came much slower. The establishment of a professional civil service in state and local governments varied among states, counties, and cities. However, the adoption of the merit system can usually be dated from the early 20th century, during the reform period of the muckrakers. In some states civil service reform was well established, with a central personnel office that included the civil service commission (or similar board) or they was a central personnel office headed by a single personnel director with virtually no power. At the local level/municipal level, by mid to end of the 20th century most large cities had developed some sort of merit system. Most small cities and rural areas had relatively few public employees, thus few had set up formal merit systems. For those states and

cities that did not reform. The federal government was generally left to using the "carrot and stick' approach to enforcement. New York State was one of the first to implement reforms. Things like the New York Civil Service Reform Association, 1877, and the New York Civil Service Commission serviced as examples for other states. In September 1883, the New York Civil Service Commission issued regulations for personnel employment in the following areas: canals, public works, prisons, asylums, and reformatories. This is not to say that administration of reform policies were immediately effective. In states that were slow to adopt merit systems, the Grant-in-aid programs were administrated using the "cut off the water" method. If state, city, local government did not reform, as suggested by the federal government, and their project received federal funds (in part or whole) then the dollars would be cut off until such time the reforms were instituted.

Example. In 1939, the federal government passed the "Social Security Act Amendments." Under this act states were required to develop merit systems for civil servants that were either fully or partial paid with federal government funds. If the state failed to implement a merit system they would loss the funds. That same requirement exists for Federal Grant-In-Aid to states.

c. The baseline merit system standard is defined in the federal government Office of Personnel Management in 5 C.F.R. section 900.603. Some highlights of section 900.603 are:

Recruiting, selecting and advancing employees on the basis of their relative ability, skills, and knowledge, including open consideration of qualified applicants for initial appointment.

Training employees, as needed, to assure high quality performance.

Providing equitable and adequate compensation.

Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected. *[However, the employee still has the right to challenge separation. Supervisors must be prepared to defend their actions during the grievance process. It has been my personal experience that this is the area where supervisors most often fail to do their homework.]*

Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age, or handicap and with proper regard for the privacy and constitutional rights as citizens. *[In this requirement you can see the linkage to Federal Equal Employment Opportunity and nondiscrimination laws.]*

Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the

result of an election or a nomination for office. [Thus prohibiting such things as imposing on employee to take part in political campaign activities, or stating their political party.]

As a result of the "carrot and stick" approach, state and local governments were pushed into implementing civil servant rights and reforms.

#### **WHAT'S NEXT? IMPLICATIONS FOR FUTURE GOVERNMENT EMPLOYMENT.**

a. Past efforts to create a fair work environment have been outlined in the above paragraphs. Whether the laws were enacted as a proactive means or a reactive spirit, they form the framework for the fair and equitable treatment of federal civil service employees. Additionally, many of these laws set the standard for private sector employment rights. Just about every few years one of these laws is amended to address new protections. In the case of grievance procedures; federal civil service employee enjoys more protection rights than his counterparts in the private sector. Additionally, the hiring and firing protections discussed in paragraph III are not generally available in the private sector. As mentioned earlier, these are only the most significant of the laws governing civil service employee rights in the workplace. So it would appear that federal civil service system has built a work place environment that protects its employees to the utmost. As such, it should be one of the most attractive work environments available. However, that is not the case. The ranks of civil servants are getting thin and projections are showing it getting worse over the next five years.

b. So, what can be done to attract new recruits and retain careerists. The Merit System Protection Board (MSPB) conducts a periodic (every 4 years) survey of federal civil service employees. The purpose of the survey is to gather feedback from employees to make the system better. Many good recommendations have come from this effort. I have included some of the feedback in text boxes found throughout this document.

c. The Federal Government Office of Personnel Management (OPM) and the Merit System Protection Board (MSPB) is addressing all of the concerns expressed by employee in the survey. In fact they have conducted a Year 2000 survey to continue to solicit employee feedback and to determine if some of corrections emplaced have had a positive impact. Some of the current ideas circulating in the federal personnel management arena are:

(1) Alternative Grievance Resolution.<sup>13</sup> Revise grievance process to achieve quick resolution. Allow supervisors more flexibility in resolving problems. Or allow mediation through an official mediator. Mediation at the lowest level allows for quicker resolution. The intent of this effort is to solve the problem at the lowest level and fastest time. Currently employees have

the right to go directly to the MSPB or court (via a private attorney) to get conflict resolution. Of course the change would also reduce the government's court case workload.

(2) "On the spot" hiring is being tested at some agencies. To compete successful for high demand – low-density skills (e.g. technology, computer programmers, and researchers is to be able to attend recruiting fairs) we must get faster at putting a contract in the face of the recruit. Think of it this way – you have just given an impressive pitch to a group of possible recruits and they are all fired up and ready to commit. What happens next? Well, if you are a federal government recruiter, you pass on stacks of hiring papers and *wait* for the Civilian Personnel Office to process the paper work. Well, while you are *waiting* the hot new recruit has found some other company that is willing to put him to work immediately, with a good salary. You just lost. Yes – the federal government just lost a good recruit! Reform in this area is critical to be able to hire quality individuals to fill the roles.

(3) Flexible Assignment Option.<sup>14</sup> In my opinion this one is one the best ways to demonstrate management commitment to good career employees, while capturing the action of possible new recruits. The basis is to provide management the option of finding an alternative job assignment, if possible within the same organization, to employees that have lost the ability to perform at their current position due a medical conditions. This option allows the organization to retain the expertise of a career employee that is still of benefit to the organization. It also gives the employee the option of continuing their employment with an organization that they feel is committed to fair management practices.

d. The feedback from the MSPB 2000 survey is being compiled now. Hopefully it will enlighten Civil Service Management on new or old challenges in the federal work place.

## **RECOMMENDATIONS.**

I will start by stating clearly the initiatives mentioned in paragraph VII must be sustained. Maybe not all of them are perfect for every agency, but surely they are workable in many organizations. In addition, I make the following recommendations.

(1) Continue to update, via amends, the current laws. No law can be all encompassing from its birth, thus updates are critical to maintaining a credible deterrence to improper treatment of employees. Failure to do so would demonstrate a willful disregard for human rights and fair treatment.

Example. I mentioned earlier the Equal Pay Act of 1963 did not address that pay equity. Therefore, many jobs in the workplace are still not receiving the fair appraisal of their worth to the organization. Many of the jobs were clerical positions in the past, but there are now

administrative assistant positions that require the employee to have a good automation background.

(2) Where necessary, enact new laws to cover emerging areas of possible conflict or employee rights. Already the information age has introduced new challenges to safeguarding employee information. How much information should the employer keep or share on the employee. Additionally, advancements in the field of medicine challenge the some right-to-know rules about pre-existing medical condition(s) or family history.

(3) Advertise the benefits of working for the government. Many young people in the work force don't see the benefits, they only hear of *misperceptions* from the media or other outside sources. The ".com" businesses of the late 1990's promised the youth of this nation big paychecks and the chance to become overnight (well almost overnight) millionaires. Well floor dropped out of the ".com" companies in late 2000 and 2001 so reality returned to work place of private businesses. Thus creating a perfect opportunity for the government organizations to recruit some of the best minds the U.S. has to offer. The government must get the word out to attract the talented recruits. There is a saying in the recruiting business that drives the way recruiters do business – "**first to contact, first to contract.**" This is a simple but powerful phrase in the hiring business. Be honest upfront! Talk about the benefits and laws protecting the work force, the opportunity for challenging assignments, and opportunity to contribute to our nation. Also, be honest about the requirement for background checks and periodic updates. Explain the importance of personal checks to guard our nation's security. This will deter some recruits, but most will understand it be a small intrusion for the benefit.

## **CONCLUSION.**

The civil service system has undergone many changes since the days of Spoils-Patronage. From the implementation of a Merit System to work environment rules, the federal employee has not seen his/her constitutional rights upheld. It has been my personal experience that many young applicants hold a belief that working for the government would intrude on their personal freedoms or constitutional rights. My research has shown just the opposite is true. The constitutional rights of government employees are far better protected in the federal/public sector than in the private sector. However, there are new work place situations developing everyday. As these new situations arise they must be deal with effectively. History has taught us that the federal government is more likely to address employee rights faster than the private sector. The federal government must get this good news out to the public. Providing

a fair and harassment free work place allows the employee to concentrate on the mission of supporting the point of the spear. The federal government is the leader in protecting employee rights. There is no more important asset to an organization then its people. There is no more important job in this nation then safeguarding the freedoms we hold dear. Civil Service employees are a critical part of this nation's workforce and they desire the best work environment possible.

WORDCOUNT = 7,743

## ENDNOTES

<sup>1</sup> Civil Service Act of 1883, United States Code, Title 632, 22 Stat, Section 403, 1883.

<sup>2</sup> Civil Service Reform Act of 1978, United States Code, Public Law 95-454, 92 Stat. 1111, 1978.

<sup>3</sup> The Politic Activities or Hatch Act of 1940, United States Code, Public Law 54 Stat. 39.

<sup>4</sup> Edward Said, "American Elections: System or farce?" 2000, available from [http://www.zmag.org/american\\_elections.htm](http://www.zmag.org/american_elections.htm); Internet 26 February 2001.

<sup>5</sup> The Civil Rights Act of 1964, United States Code, Public Law 82-352, 78 Stat. 241, 1964

<sup>6</sup> The Equal Pay Act of 1963, United States Code, Public Law 88-38, 77 Stat. 56, Title 29, Section 206, 1963.

<sup>7</sup> Civil Rights Act Of 1866, United States Code, Title 42, Section 1981, 1866.

<sup>8</sup> The Fair Labor Standards Act of 1938, United States Code, Title 29, Section 201, 52 Stat. 1060.

<sup>9</sup> Pat Roberts, et al., "The Senate Ethics Manuals: Select Committee on Ethics United States Senate". U.S Senate. (U.S. Government Press, 2000), pg 21-196.

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> U.S. House Of Representatives, "Ethic Maunal For Members, Officers, and Employees of the U.S. House Of Representatives," January 2001, available from <http://www.house.gov/government/ethics/Ethicforward.html>. Internet; accessed 30 March 2001.

<sup>13</sup> Janice Lander, Chief, Civilian Personnel Policy Division, Office of the Deputy Chief of Staff for Personnel, telephone interview by author, 20 March 2001.

<sup>14</sup> Ibid



## BIBLIOGRAPHY

- Brooks, Jack Honorable, The Constitution Of The United States of American. Washington D.C: U.S. Government Printing Office, 2000.
- Mace, Don and Yoder, Eric, Your Job Rights: The Federal Employees Guide to Appeals and Grievances. Federal Employees News Digest, Inc. 1993
- Berger, Raoul, Government by Judiciary: The Transformation of the Fourteenth Amendment. Harvard University Press, 1991.
- Packer, Cathy, Freedom of Expression in the American Military: A Communication Modeling Analysis. Praeger, 1989.
- U.S. House Of Representatives, Ethic Maunal For Members, Officers, and Employees of the U.S. House Of Representatives. January 2001. Available at <http://www.house.gov/ethics/Ethicforward.html>. Internet. Accessed 30 March 2001.
- Roberts, Pat, Harry Reid, Bob Smith, George V. Voinovich, Kent Conrad, Richard J. Durbin, The Senate Ethics Manuals: Select Committee on Ethics United States Senate. U.S Senate. September 2000.
- U.S. Merit System Protection Board. Issues Of Merit. Office of Policy and Evaluation: U.S. Merit Systems Protection Board, April 1996.
- Lander, Janice, Chief, Civilian Personnel Policy Division, Office of the Deputy Chief of Staff for Personnel, Telephone interview by author, 20 March 2001.